United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JACK W. McRAE Appellant v. UNITED STATES OF AMERICA Appellee	)	No. 21980

487

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA FROM A JUDGMENT AND CONVICTION FOR RAPE AND ASSAULT WITH A DANGEROUS WEAPON

BRIEF FOR APPELLANT

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916 Union Trust Building
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October 10, 1968

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Statement Under Local Rule 8(d)

This case has not previously been before this Court, under either the same or a similar title.

STATEMENT OF THE CASE

A

The Pre-Trial Proceedings

In an indictment filed in the United States District Court for the District of Columbia on May 15, 1967, the appellant was charged with rape (22 D.C.C. 2301) and assault with a dangerous weapon (22 D.C.C. 502). Thereafter on October 12, 1967, counsel for the appellant filed a Motion for Discovery and Inspection seeking in pertinent part to inspect and copy the reports of any scientific tests made by the United States upon the clothing of either the complaining witness or the appellant. Filed at the same time by appellant was a Motion to Suppress which sought to have the Court suppress certain evidence from use at trial, including all physical evidence seized from appellant subsequent to his arrest, as well as all evidence pertaining to the alleged identification by the complaining witness of the appellant after he had been arrested by the police.

On November 3, 1967, the said Motions came on for hearing before Judge William B. Jones. At that time the Government announced that it did not oppose appellant's Motion for Discovery and Inspection and thereafter counsel for appellant was permitted to read the reports of certain tests which had been made upon the clothing of the complaining witness and the appellant by experts from the laboratory of the Federal Bureau of Investigation (Tr. 2A). These tests revealed that in the opinion of the experts fibers taken from the clothes worn by the appellant on the date of the alleged crimes matched fibers found on the clothes which had been worn by the complaining witness on the same date and had also matched certain fibers which had been found on a couch pillow belonging to the complaining witness and that in addition fibers taken from the clothes of the complaining witness matched fibers found on the clothes of the appellant (Tr. 289-309).

Judge Jones then proceeded to hear the Motion to Suppress Evidence and at the conclusion of the testimony of the arresting officer and after consideration of the argument of counsel for the appellant and counsel for the Government, he granted appellant's Motion to Suppress from use in evidence at the trial all physical evidence which had been taken from the appellant by the police, which included a knife, all clothing which had been taken from appellant, and also certain pubic hairs and hair taken from the head of the appellant (Tr. 37). Judge Jones did not rule on that part of appellant's Motion to Suppress the Evidence which dealt with the identification of appellant by the complaining witness since

he was of the opinion that this was a matter which should be raised at the trial (Tr. 13A, 37).

On November 9, 1967, the Government sought to have the Court reconsider its action in suppressing the evidence by filing a motion entitled Memorandum In Opposition To Defendant's Motion to Suppress. On November 15, 1967, appellant filed a reply to the Government's Memorandum. On November 21, 1967, Judge Jones signed an order again granting the appellant's Motion to Suppress Evidence, which in effect was a denial of the Government's effort to have the Court reconsider its ruling of November 3, 1967.

On Friday, February 9, 1968, the Government filed its Motion for Reconsideration of the Granting of Defendant's Motion to Suppress By Order Dated November 21, 1967, and on the same day Judge Jones, ruling for the third time on the suppression, denied the Government's aforesaid Motion for Reconsideration. The trial of the case had previously been scheduled to begin the following Monday, February 12, 1968.

B

The Trial Proceedings

On Monday, February 12, 1968, trial commenced before Judge Burnita Matthews and after both sides had announced ready for trial, and prior to selection of a jury, counsel for appellant sought to have the trial Court hear the Motion for Suppression of the identification testimony pursuant to Judge Jones' ruling whereby he had held that this part of the Motion to Suppress Evidence should be deferred until the trial date (Tr. 7, 13A, 37).

In addition to seeking to have the Court suppress the evidence of the identification of the appellant by the complaining witness made after his arrest by the police, counsel for appellant also requested the Court to conduct an in-Court line-up out of the presence of the jury to determine whether the complaining witness could pick the defendant from the line-up (Tr. 15-19, 24). Instead of granting appellant's request, the Court at the request of the Government, and over the objection of the appellant, decided to hear testimony and rule on the admissibility of the physical evidence, which had previously been suppressed by Judge Jones (Tr. 37-41). The Court then heard the testimony of the same arresting officer who had previously testified before Judge Jones. At the hearing before Judge Matthews, the arresting officer testified differently than he had before Judge Jones (Tr. 3-26, proceedings of 11-3-67) and (Tr. 40-100, proceedings of 2-12-68).

Thereafter, Judge Matthews overruled the three prior rulings of Judge Jones, holding that the physical evidence, e.g., the knife, and clothes allegedly taken from the appellant, could be introduced into evidence at the trial and also overruled the appellant's Motion for Suppression of the Evidence of the identification of appellant by the complaining witness and denied appellant's request to conduct an in-court line-up (Tr. 130-133). A jury was then selected and on February 13, 1968, the Government began presenting its evidence to the jury which revealed substantially the following facts:

On March 9, 1967, the complaining witness, Emma Lee Allen, was at her home, 1625 D Street, N. E. with a male visitor, one K. P. Harris, between 10:00 and 11:00 p.m. when someone either knocked or rang the front door bell (Tr. 84). Upon answering the door, Mrs. Allen observed a young man whom she described as being about six feet tall (Tr. 89). The young man stated that he wanted to see the complaining witness' son, Gregory, and upon being told that Gregory was not home he asked the complaining witness to secure some shoes which Gregory had and which belonged to him (Tr. 46). Mrs. Allen testified that she went to the basement to look for the shoes, she was unable to find them, and as she was coming back up the basement steps, the young man came rushing down the basement steps, pulled out a knife, cut her on the face, and proceeded to have sexual intercourse with her against her will (Tr. 47, 8). The complaining witness testified that she screamed twice during the assault about two or three minutes after she had left K. P. Harris to go to the basement, but that no one responded to her screams (Tr. 47, 8, 106, 7). According to the testimony of the complaining witness, after completing the assault, the young man left her house, and she then went upstairs and reported what had happened to a roomer (Tr. 114). The roomer then left the house and was not seen until three days later when he returned to secure his clothes and move (Tr. 114, 5). No report of the alleged rape was made to the police at this time. About ten minutes after the roomer had departed, two young friends of her son, Gregory, came to the house and the complaining witness allegedly told

them what had happened (Tr. 115). After waiting for over an hour for her son, Gregory, to come home, the complaining witness went to the District of Columbia General Hospital in a cab arriving about 1:00 a.m. on March 10 (Tr. 116, 7).

The complaining witness testified that she then made a report to the police, that her son, Gregory, came to the hospital and thereafter left with two policemen, while she remained at the hospital (Tr. 53, 4).

Other testimony revealed that the police returned to the hospital and asked her to accompany them and she thereupon walked from the hospital, looked into the back seat of an automobile where two men were seated, identified the appellant as one of the men and stated that he was the one who had assaulted her (Tr. 169-171). During her testimony the complaining witness identified the appellant in Court as her assailant (Tr. 54).

Officer Richard A. McCaffrey testified at the trial before the jury that he had responded to the District of Columbia General Hospital on March 10, 1967, shortly before 2:00 a.m., and interviewed the complaining witness and then had gone with Gregory Allen and a fellow officer to 442 - 20th Street, N. E. and had arrested the appellant seizing a knife which was on the right arm of a chair where the appellant was sitting apparently asleep (Tr. 160-162). This officer then testified that he drove the defendant to the District of Columbia General Hospital. This officer testified further that at the time of the arrest he detected an odor of alcohol on appellant's breath and that he was in an incoherent condition (Tr. 164, 5). The officer testified further that it

was not until after the appellant had been identified at the hospital that appellant was advised of his right to a lawyer and that the defendant was not taken to Court until 10:00 a.m. on March 10 (Tr. 171).

Officer Robert F. De Milt testified that at about 5:45 a.m. on March 10 he obtained certain clothing from the appellant at the detective's office of the Ninth Precinct which included a pair of pants, a shirt, a T-shirt and a pair of shorts (Tr. 211, 2, 3). (This was the same evidence the use of which had been suppressed by Judge Jones). The officer testified that these articles of clothing together with certain clothing of the complaining witness were subsequently taken to the Federal Bureau of Investigation (Tr. 216). On cross-examination, Officer De Milt testified that a Police Department form made out in connection with the investigation of the case reflected the appellant's height as being five feet, seven inches and his weight 140 pounds (Tr. 225).

Special Agent Allison Semms of the Federal Bureau of Investigation, an analytical chemist, testified as to the presence of blood on the knife and blood and spermatazoa on certain articles of the defendant's clothing. (These were the items which had been suppressed from use in evidence at the trial by Judge Jones). This witness also testified as to the presence of blood on certain articles of clothing worn by the complaining witness on the date of the alleged crimes (Tr. 224).

Special Agent Nelson K. Jennett of the Federal Bureau of Investigation, who qualified as an expert witness

on identification of hairs, fibers and textiles, testified that he had examined certain articles of clothing which had been submitted to him (the clothes of the appellant the use of which had been suppressed by Judge Jones and the clothing of the complaining witness) and that in his opinion certain fibers from the complaining witness' clothing matched fibers found on the clothing of the appellant. Specifically, he testified that red acrylic fibers taken from a red sweater worn by the complaining witness matched red acrylic fibers which he had found on the appellant's undershorts and trousers. Furthermore, he testified that certain fibers taken from a shirt and an upper garment worn by the complaining witness matched fibers found on appellant's shorts, trousers, T-shirt and sports jacket (Tr. 293, 4).

In addition, the witness testified that in his opinion fibers found on certain articles of the complaining witness' clothing including a two piece suit, slip and brassiere could have come from the appellant's sport shirt (Tr. 295). The expert witness testified at length giving the reasons for his opinion (Tr. 296-303). This witness also testified that he had examined fibers from a piece of couch fabric and had found fibers on the appellant's undershorts, trousers, T-shirt and sport shirt and a microscopic comparison of the fibers revealed to him that they matched in all microscopic characteristics (Tr. 303, 4).

Officer De Milt had previously testified that he had taken a sample of the couch seat, where the complaining witness had been lying when she had been allegedly raped

and had brought it to the Federal Bureau of Investigation for analysis (Tr. 209).

Further pertinent testimony adduced at the trial included the testimony of Drs. Edward J. Hurwitz and Sofie Perry who testified concerning their analysis of smears of a substance allegedly taken from the vaginal vault of the complaining witness (Tr. 310-325, 326-335, 349-353).

After argument of counsel, and after the jury had been charged by the Court, the jury retired to consider its verdict the afternoon of February 15, 1968. After deliberating several hours the jury was excused from further deliberation at 5:00 p.m. (Tr. 460). The jury resumed its deliberation on Friday, February 16, 1968 and was again unable to reach a verdict on that day and was excused until the following Monday. On Monday, February 19, 1968, the Court over the objection of counsel for appellant charged the jury in accordance with the "Allen" charge and shortly thereafter the jury returned its verdict finding the appellant guilty on both counts of the indictment (Tr. 469-477).

ARGUMENT

I

The Trial Court Erred By Admitting Into Evidence The Items Of Physical Evidence Taken From Appellant, The Use of Which Had Been Suppressed By Another District Court Judge Who Had Granted The Appellant's Pre-Trial Motion To Suppress The Said Evidence And Had Denied The Government's Subsequent Motions For Reconsideration

It is respectfully submitted that the trial court erred by overruling Judge Jones and that the various rulings

by Judge Jones concerning the illegality of the seizure of the physical evidence from appellant on three separate occasions prior to trial had become the law of the case and was binding on the trial court.

The appellant as a result of the trial court's ruling was caught by surprise and placed at a great disadvantage in presenting his defense. It is important to note that at the time of filing his Motion to Suppress Evidence the appellant also filed a Motion for discovery seeking to inspect and copy the results of any and all scientific and laboratory tests performed upon the evidence seized from the appellant. The Government consented to permit the appellant to inspect and copy the aforesaid scientific and laboratory reports, but after Judge Jones had granted the Motion to Suppress Evidence there was no reason to study these reports and move for the appointment of independent experts, since it had been ruled on three occasions that this evidence could not be used against the appellant at trial. If it had been known prior to trial that the Government would be able to introduce the suppressed evidence at trial and call expert witnesses from the Federal Bureau of Investigation to testify concerning the results of their examination upon the articles of suppressed evidence, then counsel for the defendant would have had the opportunity to move for appointment of independent experts to examine the evidence, in an effort to rebut the testimony of the Government experts.

The testimony of the Federal Bureau of Investigation experts concerning the fibers found on the clothing of the

appellant was the strongest evidence in the Government's case against the appellant. The prosecution argued the importance of testimony of the Federal Bureau of Investigation experts regarding the clothes and fibers at great length to the jury, and the Court also commented on this evidence in its remarks to the jury (Tr. 400-404, 432, 446, 7). The jury thereafter asked to examine the said evidence during its deliberations (Tr. 462-464). Without the use of the evidence which had been suppressed by Judge Jones, the Government's case would have been very weak and would undoubtedly have resulted in an acquittal since even with the use of the said evidence the jury deliberated for two days before reaching a verdict.

A ruling on a motion to suppress evidence becomes a controlling rule in the case and a litigant may not be permitted to renew contentions upon which the Court has ruled. Waldron v. United States, 95 U.S.App.D.C. 66, 219 F.2d 37 (1955); Steele v. United States, 267 U.S. 505 (1925).

Although there are decisions holding that during the course of a trial, if it becomes apparent that a defendant's constitutional rights may have been violated, a motion to suppress evidence may be renewed at trial by a defendant, nevertheless it is submitted that this rule does not apply where a defendant's Motion to Suppress Evidence has been granted prior to trial. Cf. Anderson v. United States, 122 U.S.App.D.C. 277, 352 F.2d 945 (1965). Since at the time of trial the Government did not have the right to appeal from the granting of a Motion to Suppress Evidence,

it could not do indirectly what it was precluded from doing directly by seeking to relitigate the same issue before another trial judge. This is particularly true in the present case where Judge Jones not only granted the appellant's Motion to Suppress but thereafter also denied two efforts by the Government to persuade him to change his ruling. Generally, one judge in a coordinate jurisdiction with another judge should not overrule the other, except in exceptional circumstances. United States v. Koenig, 290 F.2d 166 (5th Cir., 1961), affirmed 369 U.S. 121 (1962). Rouse v. United States, 123 U.S.App.D.C. 348, 359 F.2d 1014 (1966), is not to the contrary. In Rouse the Court denied the defendant's Motion to Suppress Evidence with the right to renew the Motion during the course of the trial. The facts in that case revealed that there had been a sharp discrepancy between the testimony of two police officers and there was a contention that the police testimony had been a fabrication. In the case at bar there was no contention by the Government that exceptional circumstances warranted another hearing nor under the facts of this case could any such contention have been made. Nevertheless, the Government was permitted to put the same arresting officer on the stand before the trial judge who thereafter proceeded to overrule the pre-trial judge. The purpose of 41(e) of the Federal Rules of Criminal Procedure is to eliminate delay at trial and to prevent multiple hearings of the same issues. In the present case there had been an extensive hearing before Judge Jones who also considered and twice rejected certain legal authorities presented to him

by the Government after his ruling. Thereafter to permit the Government at the trial to conduct another extensive hearing into the legality of the seizure was in contravention of the purpose of the Rule 41(e) and constituted error.

It is also submitted that the Government was collaterally estopped from relitigating the issue, which had been resolved by the pre-trial judge in three separate rulings prior to trial. Cf. Laughlin v. United States, 120 U.S.App.D.C. 93, 344 F.2d 187 (1965).

Furthermore, it is submitted that Judge Jones' ruling that the appellant's home had been illegally entered and that all physical evidence taken from the appellant pursuant to the illegal entry should be suppressed was correct and that the trial court erred in holding that the said entry had been legal.

In the course of the hearing before Judge Jones on November 3, 1967, the arresting officer testified that he had knocked at the door of the appellant's home at about 2:40 a.m. on March 10, 1967, that a child of about eleven years of age had answered the door, that he had identified himself as a police officer, asked if Jack McRae was there and upon being told that he was, had thereupon walked into the appellant's home and arrested him (Tr. 9-13, proceeding of 11-3-67). The Court found that the officer had not properly announced his authority and purpose, that the entry into the appellant's home had been illegal and he, therefore, suppressed from use in evidence all physical evidence taken from appellant after his arrest, basing his decision princi-

pally on the authority of Miller v. United States, 357 U.S. 301 (1958), and Keiningham v. United States, 109 U.S.App.D.C. 272, 287 F.2d 126 (1960). See also Sabbath v. United States, ____U.S.____, 36 U.S. Law Week, 4502 (June 3, 1968) (Tr. 44-59, proceedings of 11-3-67).

When the same arresting officer testified again before the trial judge he added to his testimony by stating that prior to his entry he had noticed a knife near the appellant. The officer had not testified to this fact before Judge Jones and his subsequent testimony may have been an effort to bring the case within the "necessitous circumstances doctrine" and obviate the proper announcement of authority and purpose before entry. Appellant is unable to state the reason why this testimony was not brought out before Judge Jones, but certainly the change in testimony is an example of the harm that can result to a defendant by conducting several hearings involving the same issue before different judges and the importance of obtaining a final ruling on motions to suppress evidence prior to trial, particularly where there has been a ruling in favor of a defendant.

II

The Court Erred In Admitting Testimony Concerning The Identification Of The Appellant By The Complaining Witness In D. C. General Hospital

After arresting the appellant, the police immediately took him to the D. C. General Hospital for the purpose of being viewed by the complaining witness. This procedure

was in violation of the appellant's Constitutional rights under the Fifth Amendment to the Constitution in that he was deprived of due process of law. The practice of showing suspects singly to persons for the purpose of identification and not as part of a line-up has been widely condemned. Stovall v. Denno, 388 U.S. 293, 302 (1967). There was no reason why in the present case the appellant could not have been placed in a line-up and then viewed by the complaining witness. The complaining witness was physically able to walk out to the police car and view the appellant who was seated next to a policeman, quite unlike the witness in the Stovall case who was thought to be dying. The Supreme Court of the United States recognized in the Stovall case that a confrontation may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to deprive an accused of due process of law. In the case at bar it is submitted that the appellant who was a Negro was deprived of due process of law, when he was placed in the back of a police car seated next to a police officer who was a Caucasian and identified by the complaining witness under those circumstances (Tr. 76).

The manifest unfairness of the identification was directly caused by the failure of the police to obey the mandate of Rule 5(a) of the Federal Rules of Criminal Procedure. Had the police obeyed Rule 5(a) and the many pronouncements of this Court with reference thereto they would have taken the appellant before a committing magistrate.

since probable cause for his arrest had been established. The appointment of an attorney at this juncture would have protected the appellant's rights including the right to a fair confrontation and devoid of the suggestive circumstances which attended appellant's identification in this case.

Thus, the appellant was deprived of his Constitutional rights when the police failed to advise him of his right to a lawyer and to prompt arraignment until after he had been identified by the complaining witness. Cf. Miranda v. Arizona, 384 U.S. 436 (1966). The arresting officer testified that when he first arrested the appellant that he was incoherent and smelled strongly of alcohol. However, instead of advising him of his Constitutional rights or taking him before a committing magistrate he immediately took him to the D. C. General Hospital to be viewed by the complaining witness. Only after he had been identified did the police advise the appellant of his right to have a lawyer (Tr. 69-80). This constituted another serious violation of the appellant's rights and serves as another reason why the testimony concerning the identification at D. C. General Hospital should have been suppressed.

The probability of mistaken identity in this case is heightened when it is noted that the 5'7", 140 pound appellant was described by the complaining witness prior to arrest and identification as having been about six feet tall, 170 pounds (Tr. 61). See also Wright v. United States, ____U.S.App.D.C.____, ____F.2d____(No. 20,153 decided January 31, 1968).

Therefore, the Court erred in not suppressing all evidence concerning the identification of the appellant by the complaining witness at D. C. General Hospital.

III

The Court Erred In Refusing To Suppress From Use In Evidence Items Of Physical Evidence And The Evidence Of The Identification Which Had Been Obtained By The Police During A Period Of Illegal Detention

The appellant was arrested at about 2:00 a.m., on March 10, 1967. The arresting officer testified that the appellant smelled of alcohol and was incoherent (Tr. 69). Instead of taking the appellant to a committing magistrate in conformance with the provisions of Rule 5(a) of the Federal Rules of Criminal Procedure, the police took him to D. C. General Hospital to be identified by the complaining witness and then to a police precinct where at about 5:00 a.m., they took certain articles of clothing from him in addition to hairs from his body. Since the appellant had not been taken to a committing magistrate without unnecessary delay the said articles of evidence were taken from him during a period of illegal detention and the Court erred in not suppressing the use of the said items.*

Furthermore, this was an additional ground for suppressing the evidence of the identification at the D. C. General Hospital, since that evidence was likewise obtained during a period of illegal detention. In the case of Bynum v. United States, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958) Judge Bastie speaking for the Court said

*See also D.C. Code 34-140.

(104 U.S.App.D.C. at pages 368, 370):

> "Here it becomes important to determine the rationale of those decisions of the Supreme Court which, in other circumstances, have excluded evidence as the product of unlawful arrest and detention. It is well settled that an article taken from the person of an individual on the occasion of an illegal arrest is not admissible in evidence against him although it is relevant and entirely trustworthy as an item of proof. United States v. Di Re, 1948, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210; Bolt v. United States, 55 App.D.C. 120, 2 F.2d 922. Again, if the police have obtained a statement from an accused person during his illegal detention, no showing that the statement has been obtained without coercion and accurately recorded can make it admissible, although it may seem to be a trustworthy and patently relevant voluntary statement. Upshaw v. United States, 1948, 335 U.S. 410, 69 S.Ct. 170, 93 L.Ed. 100; Mallory v. United States, 1957, 354 U.S. 449, 77 S. Ct. 1356, 1 L.Ed.2d 1479. In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative. In the cited cases judicial authority over the manner on which justice shall be administered is exercised in a way calculated to implement the constitutional guarantee.
>
> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic

> of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed."

Cf. United States v. Klapholz, 230 F.2d 494 (2nd Cir., 1956), cert denied 351 U.S. 924 (1956).

In the recent case of Adams v. United States, ____U.S. App.D.C.____, ____F.2d____ (No. 20547, decided June 21, 1968), this Court pointed out that there was no question before it as to the effect of a Rule 5(a) violation on identification testimony obtained during the course of a period of illegal detention but seemed to imply that there would be a serious question as to the admissibility of such testimony.

Appellant submits that all evidence, whether it be a confession, physical evidence or testimony concerning an identification, obtained during a period of illegal detention as a result of a violation of Rule 5(a) of the Federal Rules of Criminal Procedure should be suppressed and that the lower court erred in refusing to suppress the evidence on this ground.

IV

The Court Erred In Refusing To Grant The Appellant's Motion To Conduct A Line-Up Prior To The Beginning Of Trial

This Court following the holding of the Supreme Court in Stovall v. United States, supra has had occasion recently to comment upon the fairness of a line-up as it affects the defendant's Constitutional rights. See Wright v. United States, supra. Appellant's counsel, realizing

that appellant had never been afforded a fair line-up, attempted to cure this Constitutional omission by requesting a fairly conducted line-up in the courtroom, prior to the time the jury panel was brought to the courtroom (Tr. 18, 19, 130-131). This request was denied by the trial court (Tr. 133). After the appellant's request had been denied, the complaining witness then had the opportunity to view the appellant sitting at counsel table during the voir dire examination and her subsequent identification of him during the trial in the presence of the jury then became a foregone conclusion.

It is submitted that the failure of the police to conduct a fair line-up, compounded by the failure of the trial court to rectify the situation by holding an in-court line-up, has created incurable error. Even if this case were remanded for a new trial, the identification of appellant by the complaining witness would be a foregone conclusion, since it would be tainted not only by the unfair hospital confrontation, but also by her viewing the appellant throughout the course of the first trial.

V

The Court Erred In Failing To Direct A Verdict In Favor Of The Appellant On The First Count Charging Rape

In the District of Columbia, the law requires that there must be corroboration of penetration in a prosecution for rape and that the testimony of the complaining witness standing alone is not sufficient. Franklin v. United States, 117 U.S.App.D.C. 331, 330 F.2d 205 (1964).

At the trial Dr. Hurwitz called by the Government testified that his examination of certain material from the vaginal vault of the complaining witness did not reveal any live sperm and that, therefore, he had no evidence of recent intercourse (Tr. 321, 323).

Dr. Perry, another doctor called by the Government, testified under cross-examination that she was unable to testify from her examination of certain slides that penetration had been made (Tr. 353). Under the circumstances, it is submitted that the Court should have directed a verdict in favor of the appellant on Count I. Furthermore, Dr. Perry's testimony relative to the slides she had examined should have been stricken since the proper continuity of possession of the slides had not been established by the Government (Tr. 314-321, 327-335, 349-51). Wheeler v. United States, 93 U.S.App.D.C. 159, 211 F.2d 19 (1953), cert. denied 347 U.S. 1019 (1954).

VI

The Court Erred In Refusing To Instruct The Jury On The Lesser Included Offense Of Assault With Intent To Commit Rape

The testimony of Drs. Hurwitz and Perry, although it did not constitute sufficient corroboration of penetration, could have been considered by the jury as evidence of an assault with intent to commit rape. The Court, therefore, erred in refusing to instruct the jury on the lesser included charge of assault with intent to commit rape although the evidence supported such a charge (Tr. 376-379). Hunt v.

United States, 115 U.S.App.D.C. 1, 316 F.2d 652 (1963); Young v. United States, 114 U.S.App.D.C. 42, 309 F.2d 662 (1962).

VII

The Court Erred In Giving The "Allen" Charge Over The Opposition Of Counsel For The Appellant

After the jury had been out for several days the Court gave the so-called "Allen" charge over the objection of the appellant (Tr. 466, 7, 470, 1, 2). In Moore v. United States, 120 U.S.App.D.C. 203, 345 F.2d 97 (1965), Chief Judge Bazelon, while affirming a conviction in which the charge had been given, pointed out that no objection had been made to the giving of the charge. It is respectfully submitted that where a timely objection is made, the charge should not be given for the reasons pointed out in the dissenting opinion of Judge J. Skelly Wright in Jenkins v. United States, 117 U.S.App.D.C. 346, 330 F.2d 220 (1964).

VIII

The Court Erred In Permitting The Government To Introduce Hearsay Testimony Despite Timely Objection By Counsel For The Appellant

During the course of the trial the Court over objection of counsel for the appellant permitted the complaining witness to testify what she had related to her son several hours after the alleged rape (Tr. 52, 53). The Court also permitted Officer Pratt to testify what the complaining witness related to him at 1:40 a.m., at D. C. General Hospital

which was at least several hours after the alleged rape (Tr. 143-147). It is submitted that these statements of the complaining witness made several hours after the alleged rape were not spontaneous utterances which would qualify as exception to the hearsay rule. See Beausoliel v. United States, 71 App.D.C. 111, 107 F.2d 292 (1939); Brown v. United States, 80 U.S.App.D.C. 270, 152 F.2d 138 (1945). Permitting the complaining witness to relate what she allegedly told her son was doubly prejudicial since the defense had no opportunity to cross-examine the son, Gregory Allen, who was not produced by the Government although peculiarly available to the Government.

IX

The Court Erred In Refusing To Instruct The Jury In Accordance With The Missing Witness Doctrine

On December 6, 1967, the Government in accordance with the provisions of 18 U.S.C. 3432 served upon the appellant a list of the witnesses to be produced at the trial to prove the allegations contained in the indictment. Gregory Allen, the son of the complaining witness who allegedly had been a friend of the appellant and who had given certain information which led to the appellant's arrest was listed as residing at 1625 D Street, N. E., Washington, D. C. The Government did not call this witness at the trial. During the cross-examination of the complaining witness, counsel for the appellant ascertained for the first time that Gregory Allen did not reside in Washington, D. C. but had been residing

in Oakland, California for four months. The Court refused to instruct the jury at the request of the appellant that if it should find that a witness who was peculiarly available to one party was not called by that party and his absence had not been sufficiently accounted for or explained, that it could infer that the testimony of the missing witness would have been unfavorable to the party which failed to call him (Tr. 387). Graves v. United States, 150 U.S. 118, 121 (1893); Milton v. United States, 71 App.D.C. 394, 397, 110 F.2d 556, 559 (1940); McAbee v. United States, 111 U.S.App.D.C. 74, 294 F.2d 703 (1961); Richards v. United States, 107 U.S. App.D.C. 197, 275 F.2d 655 (1960).

It is submitted that the Court erred in failing to instruct the jury on the "missing witness" doctrine since under the circumstances of this case the witness, Gregory Allen, had been peculiarly available only to the Government, which either knew or by the exercise of ordinary diligence could have ascertained the whereabouts of the witness. It is to be emphasized that on February 8, 1968, several days prior to trial the Government served a supplemental list of witnesses on the appellant but never at any time advised the appellant that Gregory Allen had moved to California.

CONCLUSION

In view of the foregoing it is submitted (1) That this Court should remand this case to the District Court with directions to enter a judgment of acquittal or, (2) That this case be remanded to District Court with directions to award a new trial and to suppress all physical evidence taken from appellant subsequent to his arrest and all evidence pertaining to the identification of the appellant by the complaining witness.

Respectfully submitted,

Thomas A. Flannery
Counsel For Appellant
(Appointed By This Court)

October 10, 1968

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,980

JACK W. McRAE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT A. ACKERMAN,
Assistant United States Attorneys.

Cr. 567-67

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Cases—Continued

OTHER REFERENCES

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Whether the trial judge erred in taking pre-trial testimony on the circumstances of appellant's arrest and in subsequently ruling the arrest valid and physical evidence seized admissible despite Judge Jones' pre-trial ruling suppressing that evidence.
2. Whether the officers' entry into appellant's apartment and his subsequent arrest were valid.
3. Whether appellant was presented to a committing magistrate without unnecessary delay.
4. Whether the hospital identification of appellant by the complaining witness comported with due process.
5. Whether the trial judge erred in refusing to grant appellant's motion for pre-trial in-court lineup.
6. Whether the trial judge erred in refusing to direct a verdict of acquittal on the first count charging rape requested because of claimed lack of corroboration of penetration.
7. Whether slides made from the complaining witness' vaginal smears were properly admitted into evidence.
8. Whether the trial judge erred in refusing to instruct the jury on assault with intent to rape.
9. Whether the trial judge erred in giving the "Allen" charge.
10. Whether the trial judge erred in admitting the complaining witness' testimony of her statement to her son that she had been raped by a friend of his or in admitting Officer Pratt's testimony of her statement to him that she had been raped.
11. Whether the trial judge erred in refusing to instruct the jury on the "missing witness" rule regarding the complaining witness' son.

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* This case has not previously been before this Court under any other name or title.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,980

JACK W. MCRAE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was charged in a two count indictment with rape and assault with a deadly weapon. After jury trial before Judge Matthews on February 12-16, 1968, he was found guilty on both counts and sentenced to nine years imprisonment (Criminal No. 567-67).

Before trial appellant claimed at a hearing on a motion to suppress that his arrest in his apartment was illegal due to lack of full pre-entry announcement of authority and purpose in compliance with 18 U.S.C. § 3109. He claimed that a knife seized immediately before arrest, certain pubic and head hairs, and certain articles of

clothing taken thereafter should accordingly have been suppressed, as well as testimony of an identification of appellant by the complaining witness shortly after arrest. At the same time appellant moved to inspect and copy the results of all tests performed on the clothing, knife, and other physical evidence, to which the Government consented. On November 31, 1967 Judge Jones granted the motion to suppress the knife, clothing, and hair. However, he ruled that the case would go to trial without suppression of evidence of the identification (Tr. B37).[1] Judge Jones granted leave to the Government to file a memorandum requesting reconsideration as to the knife, clothing, and hair (Tr. A60) and to appellant to answer thereto (Tr. A61). On November 9, 1967 the Government filed a memorandum in opposition to appellant's motion to suppress; on November 15, 1967 appellant filed a response thereto; and on November 21, 1967 Judge Jones ordered the knife, clothing, and hair suppressed. On February 9, 1968 the Government filed and Judge Jones denied a motion for reconsideration of his granting of the motion to suppress.

Immediately prior to commencement of trial before Judge Matthews appellant again moved for the pre-trial hearing on the motion to suppress the evidence of the out-of-court identification (Tr. C5, C7, C24) which Judge Jones had previously ruled he would not hold (Tr. B37). Appellant grounded his motion on claimed *Stovall* denial of due process at the pre-trial identification confrontation of complaining witness and appellant and on claimed *Mallory* post arrest failure to present appellant without un-

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[1] The transcript of argument by counsel before Judge Jones on November 3, 1967 is designated hereinafter as "Tr. A", that of testimony taken before Judge Jones on November 3, 1967 as "Tr. B" that of the pre-trial hearing before Judge Matthews on February 12, 1968 as "Tr. C", and that of the trial as "Tr.". The trial transcript for February 14, 1968 contains pages numbered 173 through 336, that for February 15 and 16, pages 314 through 478. Pages 314 through 336 on February 14, 1968 are designated hereinafter as "Tr. 314-2/14", Tr. 315-2/14" and so on, while pages 314 through 336 on February 15, 1968 are designated as "Tr. 314-2/15", "Tr. 315-2/15" and so on.

necessary delay. Appellant requested Judge Matthews to allow pre-trial examination of the complaining witness out of the jury's presence on her ability to identify the assailant and to order a pre-trial in-court lineup out of the jury's presence to determine whether she could identify him (Tr. C18-19). The Government argued that the pre-trial confrontation was valid under *Wise* v. *United States* [2], (Tr. C25-29). It requested that Judge Matthews take testimony on the circumstances of that confrontation (Tr. C25) and of the arrest and of the announcement of authority as well (Tr. C36), asserting that the available record of the pre-trial hearing before Judge Jones was insufficient upon which to base rulings by Judge Matthews whether there had been substantial police compliance with the requirement of announcement of authority and purpose (Tr. C36) and whether the safety of the arresting officers justified partial non-compliance based on exigent circumstances (Tr. C37). Judge Matthews was not able to determine from the record whether Judge Jones had concluded that the arrest had been legal or not (Tr. C33-C34, C39) or what had been his reasoning for his rulings (Tr. C33-C34, C38-C39). She concluded over appellant's objection (Tr. C37) that her responsibility for the trial required the holding of the requested hearing upon which to base the rulings requested of her as to suppression of identification testimony and physical evidence (Tr. C39-40). After examination of the arresting officer out of the jury's presence [3] Judge Matthews concluded there had been no denial of due process in the

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[2] 127 U.S. App. D.C. 279, 383 F.2d 206 (1966), *cert. denied*, 390 U.S. 964 (1968).

[3] In arguing that a hearing before Judge Matthews should be held, the Government had proffered testimony by Officer Robert Pratt that the complaining witness had told him she had seen appellant before he raped her and recognized him during the rape (Tr. C29-30). Pratt had not testified before Judge Jones. The only witness who testified at the hearing before Judge Matthews was arresting Officer Richard A. McCaffrey. Pratt later testified before the jury. Why he did not testify at the hearing held immediately after Judge Matthews' ruling granting one is unclear.

pre-trial identification (Tr. C130) and that the entry into appellant's apartment to arrest him had been valid (Tr. C130). She ruled that the physical evidence could be introduced at trial. Appellant's request for an in-court pretrial lineup was denied (Tr. 131-133).

The complaining witness was Emma Allen, a divorced mother of seven who had lived many years at her house where the attack took place (Tr. 75). Evidence showed that on March 9, 1967 she was sitting at home with a male visitor, K. P. Harris, when the assailant came to the door (Tr. 46, 84, 92) at about 10:00 p.m. (Tr. B5). Upon opening the door she saw a young man she had seen before as a friend of her 18 year old son, Gregory (Tr. 50, 53, 146). He said he wanted to see Gregory (Tr. 46). When told Gregory was not at home, the assailant said Gregory had some shoes of his and asked Mrs. Allen to get them for him (Tr. 46). She left the door slightly ajar and went to the basement to look for the shoes. Not finding them, she started to go back up the stairs when the assailant rushed down, pushed her back, and said he didn't want shoes, he wanted her (Tr. 47). When she resisted, he pulled a knife, put it under her throat, and threatened to cut her head off if she screamed (Tr. 47, 110). He pushed her down into a closet and, apparently finding space too limited, pulled her out again (Tr. 47, 110). She screamed (Tr. 47, 110). A scream was heard by an upstairs roomer, Otis McCrae (no connection with appellant) at about 9:30 to 10:00 p.m. (Tr. 28, 33-34). Thereupon the assailant cut her face, forced her down on a couch, put his hand over her mouth to prevent screaming, and had intercourse with her for about an hour (Tr. 47-48, 110-111), beginning at about 10:15 (Tr. 111). About half an hour after the assailant had first entered the house (Tr. 35, 111-112) he removed his hand from her mouth, she screamed a second time, and he threatened her with the knife (Tr. 48). She screamed a third time about an hour after the initial assault (Tr. 48). No one responded. Unknown to her, K. P. Harris had left when the appellant entered, he later told police (Tr. B35). When

the rapist had completed his assault he forced Mrs. Allen upstairs at knife point and left by the front door (Tr. 48-49, 113).

She went upstairs immediately and reported what had happened to the roomer, Otis McCrae (Tr. 29, 49, 114) and told him who she thought the rapist was (Tr. 39-42). She asked him for money for a taxicab or telephone call, but he said he had none (Tr. 49, 114). The roomer told her he had heard screams but had been afraid to go to the basement (Tr. 49). He left the house immediately thereafter at about 12:00 a.m. and called the police from a nearby pay telephone (Tr. 37-38). About ten minutes later two young friends of Gregory came to the house, asked for him, saw her bloody condition, and asked what had happened. She told them (Tr. 49). She accepted their offer to get Gregory and they left (Tr. 50, 116). When after a little over an hour no one had returned, she set out alone for the hospital (Tr. 49-50, 116).[4] She left Gregory a note saying that one of his friends had raped her and cut her face, that she had gone to D.C. General Hospital, and that he should come there as soon as possible (Tr. 50, 116). She was standing on a corner crying when a cab driver stopped, heard her story, and drove her to the hospital (Tr. 117), arriving at about 1:40 a.m. (according to Officer Pratt at Tr. 143; Mrs. Allen's estimate of the arrival time at Tr. 117 was 1:00 a.m.). There she saw a police officer for the first time, Robert Pratt. She told him she had been cut and raped at knife point by a youth whom she had seen before as a friend of her son (Tr. 146-147). She received treatment. At some point Gregory arrived (Tr. 50) and she told him she had been cut and raped at knife point by one of his friends (Tr. 51, 53).

Detective Richard A. McCaffrey was the arresting officer. He arrived at the hospital with Officer Harraty at about 2:00 a.m. (Tr. C41, C56, 155) in response to a tele-

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[4] Otis McRae testified that he returned to the house about 12:20 a.m. (Tr. 38) after telephoning the police and that police came to the house sometime after Mrs. Allen had left (Tr. 41).

phone call from Officer Pratt (Tr. B4). Detective Robert F. DeMilt of the Sex Squad was also present (Tr. C61). McCaffrey spoke to Mrs. Allen in the emergency room where she was sitting up (Tr. B8). She told him she had been cut and raped at knife point (Tr. C42) by a young man she described as Negro male, dark complected, about six feet and 170 pounds, wearing dark clothing (Tr. C61) and familiar to her because he had been in the house before (Tr. B5). She told Gregory, also present, "You know who I mean" (Tr. C62). From her description Gregory said it sounded like a fellow that lived over on 15th Street (Tr. B6, B32), that he could not quite remember his name (Tr. C43), but that he could point out his house (Tr. C43, C62, B6). McCaffrey, Harraty, and Gregory then drove to an address Gregory pointed out at 624 15th Street, N.E. (Tr. B8, B33), about eight to ten blocks from the hospital (Tr. C44), arriving about 2:35 a.m. (Tr. B9). The officers knocked at the door; a man answered; by this time Gregory had told McCaffrey that the first name of the man he was seeking was "Jack"; McCaffrey asked for "Jack"; the man identified himself as the father of Jack McCrae; to the father's query whether appellant was in trouble the officers replied that a woman had accused him of a sex crime; the father said appellant was living at 442 20th Street, N.E. (Tr. C44, C63, C83, B9). The officers drove immediately there (Tr. C44, B10), arriving at about 2:45 a.m. (Tr. C63). They stopped the car directly in front of the address (Tr. C45). The two officers went to the door at about 2:40 a.m. (Tr. B10). Gregory remained in the car, reluctant to point out his friend (Tr. C45). McCaffrey knocked for several seconds (Tr. C45-47). Both officers were in plain clothes (Tr. C46). McCaffrey had his badge in hand (Tr. C47). Harraty was standing almost in back of him (Tr. C47). After thirty to forty seconds a boy between six to twelve years old (Tr. C65, B10) partially opened the door (Tr. C47, B10-11). A red light was on inside the house, which had been visible as the officers approached (Tr. C47). No other lights had appeared to come on as a result of the

knocking (Tr. C48). McCaffrey spoke first, saying, "We are the police" (Tr. B12, C49). The boy then opened the door wider so that it was about a right angle to the entrance (Tr. C48, B12). The officers could see into the room. McCaffrey asked the boy where appellant was (Tr. B12, C49) and he said, "Over there" (Tr. B12, C49), waving his hand toward a chair five to ten feet inside of a very small room where appellant was sleeping (Tr. C49, C51, B13). From the threshold McCaffrey saw a knife sitting on the right arm of appellant's chair a few inches from his hand (Tr. C52-53, C67-69). Appellant's chair faced directly toward the door; he was nodding in his sleep, generally facing the door (Tr. C53). McCaffrey also saw one other child sleeping in the room (Tr. C52). Immediately after the boy waved toward appellant, McCaffrey walked in from the threshold and picked up the knife (Tr. C54) and then woke appellant up and arrested him (Tr. B14, C54-55). McCaffrey testified he did so in order to get the knife before appellant woke up (Tr. C55). He did not open the door any farther than the boy had done to walk in (Tr. C48, C55). No one had told him not to enter (Tr. C55). Appellant appeared to have been drinking and was incoherent (Tr. C69-70). He mumbled that he was Jack McCrae (Tr. B13). McCaffrey told him he was accused of having intercourse with a woman against her will and arrested him (Tr. B14). The officers did not advise him of his Constitutional rights at that point since he was not yet coherent (Tr. C70). An unidentified man came down from upstairs and inquired what was going on (Tr. B14). The officers told him they were making an arrest for sexual assault, whereupon the man left (Tr. B14, C56). The officers took appellant to the car where Gregory identified him as Jack McCrae (Tr. B15, C72). They drove the few blocks to the hospital, arriving there within four or five minutes (Tr. C72) at about 2:40 a.m. or 2:55 a.m. (Tr. B17, C72). McCaffrey testified they returned to the hospital for two reasons: to determine whether Mrs. Allen could identify appellant as her assailant or not and to bring Gregory back to his mother (Tr. B15, C72). At that

point they did not know whether she would be released from the hospital or admitted (Tr. B20, C77). Upon arrival McCaffrey went in to get Mrs. Allen. Appellant remained with Officer Harraty, a white male, in the back of the cruiser (Tr. C73). No one else was in the car (Tr. B20). Gregory was standing near the car (Tr. B17). McCaffrey told Mrs. Allen on the way to the car that he wanted her to look at someone the police had arrested who was in the car (Tr. B17-18, C74). He did not tell her that he had gone to his house to arrest him, that he had recovered a knife from his person, or that he thought this person might be the assailant (Tr. B18, C74). Appellant was not handcuffed (Tr. C73). Mrs. Allen, a Negro, looked into the back seat through the back window (Tr. C76). McCaffrey asked whether she recognized the person (Tr. C76). Without hesitation she said that that was the guy who did it (Tr. B19, C76). The officers immediately advised appellant of his Constitutional rights by reading a standard police form, P.D. 47, the first time they had so advised him (Tr. C77, C79, B21).

At trial testimony was given by Otis McRae, Mrs. Allen, Officer Pratt, Detective McCaffrey, and Detective DeMilt. FBI Agent Allison Semms, a chemist, testified that: human blood had been found on the knife; blood and spermatozoa had been found on certain articles of appellant's clothing; and certain articles of Mrs. Allen's clothing had blood on them (Tr. 242-248).

FBI Agent Nelson K. Jennett, an expert on hair and fiber, testified that comparison analysis of fibers showed that: many fibers found on appellant's clothing were identical to those of which Mrs. Allen's clothing were made; many fibers found on Mrs. Allen's clothing were identical to those of which appellant's clothing were made; and fibers found on appellant's clothing were identical to those of which the fabric on the couch where the rape occurred was made (Tr. 293-304).

Dr. Edward Hurwitz of D.C. General Hospital testified that he took two vaginal smears from Mrs. Allen and placed them on slides bearing Mrs. Allen's name (Tr. 312-313). He testified that he did so in accordance with

the normal practice used in this type of routine vaginal examination by the hospital (Tr. 319-2/14). Pathologist Dr. Sophie Perry of the hospital testified that: she secured that slide from the hospital's laboratory where it had been kept as part of laboratory records (Tr. 328-2/13, 334-2/14) along with a hospital report dated March 10, 1967 which was kept in the normal course of hospital business (Tr. 334-2/14, 349-350) recording the results of an analysis made at that time of two slides done to confirm or deny the presence of spermatozoa; the pathologist who made the original analysis was no longer with the hospital (Tr. 349-350); Dr. Perry had examined one of the slides just before coming to testify and found the slide had spermatozoa on it (Tr. 350); this indicated that Mrs. Allen had had intercourse within twenty-four hours prior to the taking of the smear (Tr. 351-352). The slide with spermatozoa and the original report were introduced into evidence (Tr. 349, 362, 365) under the Federal Shop Book Rule over objection (Tr. 314-2/14, 317-2/14, 364) that the doctor who made the slide was not present to identify a peculiar marking he may have made on it and the doctor who made the analysis upon which the report was based was not present.

Mrs. Allen identified appellant in court as her assailant (Tr. 54). On cross-examination of Detective McCaffery appellant's counsel introduced testimony for the first time of Mrs. Allen's out of court identification (Tr. 169) and explored the surrounding circumstances (Tr. 169-170, 191-193).

Appellant moved for a directed verdict on the first count for rape at the end of the Government's case (Tr. 366) which was denied. Thereupon the defense rested (Tr. 381). Appellant's renewed motion at the conclusion of jury instructions was denied (Tr. 455).

The jury retired to consider its verdict on the afternoon of February 15, 1968. It was excused from further deliberations at 5:00 p.m., resumed on Friday, February 16, 1968, was unable to reach a verdict, and was excused until the following Monday, when it was still unable to

reach a verdict. Over appellant's objection the judge gave the "Allen" charge (Tr. 471-472). The jury shortly returned a verdict of guilty on both counts.

SUMMARY OF ARGUMENT

I

Judge Jones' pre-trial ruling suppressing knife and clothing was not binding on the trial judge. The trial judge, being requested to suppress evidence of the hospital confrontation as occurring during a period of unlawful detention, being unable to determine from the record whether Judge Jones had concluded that appellant's arrest was invalid or what his reasoning had been, and being proffered new testimony on the arrest as well as on the identification, exercised her sound discretion properly in deciding to hear testimony on the arrest and thereafter ruling that the physical evidence was admissible. Judge Jones' ruling not being a final judgment, the Government was not collaterally estopped from arising the issues involved again at trial.

II

The officers in the circumstances of this case complied substantially with Section 3109. In avoiding unannounced intrusion into appellant's dwelling they served the statute's basic purpose fully. Their entry was permissive. The exigent circumstances of a knife seen by the officer from the threshold at the hand of a man who there was good reason to think had used it recently justified any failure to comply with the statute. This justification is based on increased peril to the officers if they announced their mission more fully.

III

Time spent in promptly confronting appellant and the complaining witness after arrest did not constitute unnecessary delay in presentment under Rule 5 Fed. R. Crim. P., nor did the failure to present him until the next scheduled court session on the following morning.

IV

The hospital identification of appellant by the complaining witness comported with due process as being proximate to the scene and time of the offense and of the search for the suspect under *Wise*. The record shows no unnecessary suggestivity. Circumstances show that chance of error in identification was extremely low, including FBI fiber comparison tests placing appellant at the crime scene.

V

Introduction of the complaining witness' in-court identification of appellant did not depend on a valid pre-trial line-up. The trial judge thus did not err in denying appellant's request for a pre-trial in-court line-up.

VI

Specific corroboration of penetration is not required to sustain conviction for rape. It was nevertheless available in evidence that spermatozoa was found in the complaining witness' vagina within twenty-four hours after the attack. The nine year sentence, being for both offenses, constituted a concurrent sentence. Any error in conviction for one offense was harmless, since appellant would have to serve the full sentence for the other.

VII

The slides made from the complaining witness' vaginal smears, one of which examination showed to contain spermatozoa, were properly admitted under the Federal Shop Book Rule.

VIII

There being a total lack of evidence that appellant assaulted the complaining witness with intent to rape but failed or declined to achieve penetration, the trial judge properly refused to give a jury instruction on assault with intent to rape.

IX

The Supreme Court and other authorities having upheld the "Allen charge", it was not improper for the trial judge to give it here.

X

The complaining witness' hospital statement to Officer Pratt that she had been cut and raped by a friend of her son was properly admitted as a spontaneous utterance under the *res gestae* exception to the hearsay rule. Her testimony of her hospital statement to her son to the same effect was not hearsay and was properly admitted.

XI

Appellant made no effort to subpoena the complaining witness' son, but relied upon the Government to call him as a witness. When appellant's counsel learned that the son was in California and not likely to appear, he made no effort to get the Court's help in securing his testimony. The son was not present at the crime and could not elucidate the transaction. The judge properly denied appellant's request for a missing witness instruction.

ARGUMENT

I. The trial judge did not err in taking pre-trial testimony on appellant's arrest and in ruling it valid and physical evidence admissible despite Judge Jones' earlier suppression of the evidence.

(Tr. C24-26, C29-30, C33-34, C37-39, C130)

Before trial Judge Jones had ordered suppressed the knife taken from appellant at arrest and clothing taken from him thereafter. Appellant contends that: (1) the trial judge erred in hearing testimony immediately before trial on the circumstances of the arrest and in ruling that the physical evidence would not be suppressed, (2) Judge Jones' pre-trial ruling on the legality of the seizures had become the law of the case, binding on the trial judge and barring the Government from renewing the

contentions ruled upon before trial, and (3) the Government was collaterally estopped from seeking a ruling from the trial judge that entry and arrest were valid and the physical evidence admissible. Appellant's contentions are not well founded.

A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances; if matters appearing before the trial judge cast reasonable doubt on the pre-trial ruling, it becomes the duty of the trial judge to consider *de novo* the issue of suppression and, if necessary, to hold a hearing out of the presence of the jury. *Rouse* v. *United States*, 123 U.S. App. D.C. 348, 359 F.2d 1014 (1966); *United States* v. *Koenig*, (5th Cir. 1961) 290 F.2d 166, *aff'd sub nom*, *DiBella* v. *United States*, 369 U.S. 121 (1962).[5] Once a judge has disposed of a point concerning admission of evidence, litigants must proceed to try the case accordingly; however, the trial court may reverse itself on a point during trial. *Waldron* v. *United States*, 95 U.S. App. D.C. 66, 219 F. 2d 37 (1955). The rule is no different whether the pre-trial motion to suppress and the trial are before the same or different judges. See *United States* v. *Jackson*, (D.C. D.C. 1957) 149 F. Supp. 937, *rev'd on other grounds*, 102 U.S. App. D.C. 109, 250 F.2d 772 (1957); *Gatewood* v. *United States*, 93 U.S. App. D.C. 226, 230-231, 209 F.2d 789, 793 (1953).[6]

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[5] The federal circuits are in disagreement as to whether a ruling on a pre-trial motion to suppress is binding on the trial court. See *United States* v. *Koenig*, (5th Cir. 1961) 290 F.2d 166, n.10.

[6] *Steele* v. *United States*, *No. 1*, 267 U.S. 498 (1925) and *Steele* v. *United States*, *No. 2*, 267 U.S. 505 (1925), are not apposite. There defendant's petition to vacate a search warrant had been denied. He appealed this separately and unsuccessfully. 267 U.S. 498 (1925). He was convicted of liquor violations after introduction of evidence seized during the search. He appealed on grounds *inter alia* that the warrant had been issued to an officer not authorized by the applicable statute to serve such a warrant. Held: accused could not raise this question in this second appeal, Steele No. 2, since the refusal to vacate the warrant in Steele No. 1 was a final decree and he had not assigned this ground in his separate appeal from the refusal to vacate. The pre-trial ruling in the instant case, in contrast, was not a final ruling from which appeal could be taken.

Here Judge Matthews was unable to determine from the record of the pre-trial hearing whether Judge Jones had concluded that the arrest was legal or not or what had been his reasoning for his rulings (Tr. C33-34, C38-39); the argument of counsel was not included in the transcript available to the trial judge (Tr. C34). Whether the arrest was legal was a question central to her responsibility for the trial. Appellant had moved Judge Matthews to suppress evidence of the hospital confrontation which occurred about five minutes after the arrest (Tr. C24) as (a) violative of due process under *Stovall* v. *Denno*, 388 U.S. 293 (1967) and (b) occurring during a period of illegal detention stemming from claimed *Mallory* failure to present promptly under Rule 5(a) Fed. R. Crim. P. Appellant had also moved the trial judge for pre-trial *voir dire* examination of Mrs. Allen on her ability to identify appellant as her assailant and for a pre-trial, in-court line-up out of the jury's presence to determine whether she could identify him (Tr. C24-25). The judge decided in the exercise of her sound discretion that her responsibility for the trial required her in order to rule on these matters properly to hear testimony on the circumstances of both the arrest and the hospital confrontation (Tr. C37-39). She did so only after vainly exploring possibilities of sending the case back to Judge Jones for trial. The Government's reliance on *Wise* v. *United States*, 127 U.S. App. D.C. 279, 383 F.2d 206 (1966), *cert. denied*, 390 U.S. 964 (1968), to uphold the identification required her to take testimony on the circumstances of the arrest in any case. Furthermore, the Government proffered a new witness on the circumstances surrounding the arrest and identification, Officer Robert Pratt (Tr. C29-30). For these reasons Judge Matthews' decision to hear testimony and her subsequent rulings that the pre-trial identification and the entry into appellant's apartment to arrest him were both valid (Tr. C130) were proper as within the sound discretion of the responsible trial judge. *United States* v. *Koenig*, *supra*; *Dibella* v. *United States*, *supra*; *Rouse* v. *United States*, *supra*.

Appellant's contention that the Government was collaterally estopped from relitigating the issue of the suppression of the physical evidence is equally unfounded. To invoke the doctrine of collateral estoppel a party must show that an important issue of fact has been previously litigated by the same parties and resolved by final judgment. *Moore* v. *United States*, 120 U.S. App. D.C. 173, 344 F.2d 558 (1965). A ruling on a pre-trial motion to suppress does not bind the trial judge in all circumstances and is not *res judicata* on the question of the admissibility of such evidence. *Rouse, supra; United States* v. *Physic*, (2d Cir. 1949) 175 F.2d 338. The Government did not have at time of trial the right to appeal from Judge Jones' order granting appellant's motion to suppress.[7] There was no final judgment to collaterally estop the Government from raising the issue again before or at trial.

Nor is *Laughlin* v. *United States*, 120 U.S. App. D.C. 93, 344 F.2d 187 (1965) to the contrary. There a dismissal of an indictment in a separate prior criminal action, from which the Government had had the right of appeal, acted to bar relitigation. This contrasts with the lack of any such final judgment in the instant case.

On October 12, 1967 appellant moved to inspect and copy results of scientific and laboratory tests performed on clothing and other physical evidence seized from appellant. Although the Government consented to this, appellant did not inspect. He claims he relied on Judge Jones' rulings, saw no reason to inspect and copy test results, was surprised by the rulings of the trial judge admitting the clothing and knife, and had no chance to inspect and possibly rebut the evidence of FBI fiber comparison tests which placed appellant at the crime scene.[8]

Since Judge Jones' rulings were not binding on the trial judge in all circumstances, *Rouse* v. *United States, supra; Waldron* v. *United States, supra; DiBella* v. *United States, supra*, appellant's counsel cannot properly claim

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[7] Appellant's Brief, p. 12.

[8] Appellant's Brief, pp. 11-12.

that he was prejudiced by his failure to inspect what he concedes was fully available to him. That appellant's able and experienced counsel failed to do so cannot transform into *res judicata* what the case law makes clear is a non-binding pre-trial ruling. Nor does the record reveal any attempt by counsel to inspect and copy these test results after the trial judge had ruled the evidence admissible. Appellant's contention is not substantial. It should be rejected.

II. The entry into appellant's apartment and his arrest were valid.

A. The officers knocked and waited until the door was partially opened by a boy about 11. They identified themselves as police and displayed a badge. They asked for appellant by name. The boy responded by opening the door wider and pointing appellant out. From the threshhold the officers could see appellant in plain view with a knife at hand.

B. Appellant contends on these facts that the ensuing entry and arrest were illegal, since the officer did not announce that his purpose was to arrest the sleeping appellant. Appellee's position is that: (1) the officers were in substantially full compliance with the statute, (2) the entry was permissive, and (3) any failure to give full compliance was excused by exigent circumstances showing a need to protect the officers' safety.

C. The officers' announcement of their identity and purpose to find appellant fully served the statute's purpose. The Supreme Court recently stated that purpose as proscription of unannounced intrusion into a dwelling. *Sabbath* v. *United States*, —— U.S. ——, 36 L.W. 4502, 4503 (June 3, 1968). This Court had earlier described the purpose as to allow the occupant to open the door to admit officers who are legally authorized to enter so that they may execute their duties with the least possible inconvenience to the occupant. *Masiello* v. *United States*, 115 U.S. App. D.C. 57, 58, 317 F.2d 121, 122 (1963). There was no unannounced intrusion here. The officers'

announcement allowed the occupant to open the door to admit them. Appellee submits that police action which serves the statute's purpose so fully constitutes substantially full compliance.

The ensuing entry was a permissive one. There was no forceful breaking down of the door, no forcing open of a chain lock on a partially opened door, no opening of a locked door by use of a surreptitiously obtained passkey, and no opening of a closed but unlocked door, either surreptitious or otherwise.[9] Nor was there a refusal of admittance. The officers' announcement rather led to an opening of the door by the occupant which was "a permissive one, and not merely one which does not result in a breaking of parts of the house." *Keiningham* v. *United States*, 109 U.S. App. D.C. 272, 276, 287 F.2d 126, 130 (1961).

However, the entry would have been justified by exigent circumstances, even if the officers had entered without permission and even if they had not announced their identity and purpose. Where, as here, the officers have good reason to believe that announcement of authority and purpose prior to entry would increase the peril to them or others within, *Sabbath* v. *United States*, *supra*, has made it clear that lack of compliance may be excused.[10] There officers with reason to believe that occu-

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[9] See *United States* v. *Silverman*, (D.C.D.C. 1958) 166 F. Supp. 838, *aff'd*, 275 F.2d 173 (D.C. Cir. 1960), *rev'd on other grounds*, 365 U.S. 505 (1961) and *United States* v. *Bowman*, (D.C.D.C. 1956) 137 F. Supp. 385, each of which involved an unannounced nonviolent entry through an unlocked door. Both decisions interpreted Section 3109 to apply only to forceful breaking and upheld the unannounced entries. In neither case did the officers speak to an occupant as police officers before entering, as was done in the instant case.

[10] The Supreme Court in *Miller* v. *United States*, 357 U.S. 301 (1958) expressly reserved the question of exceptions, stating at 308: "The requirement [of announcement of identity and purpose] still obtains. It is reflected in 18 U.S.C. § 3109. . . . There are some state decisions holding that justification for non-compliance exists in exigent circumstances, as for example, when the officers may in good faith believe that they or someone within are in peril of bodily

pants of a dwelling possessed narcotics opened an unlocked door without any announcement and entered with guns drawn after knocking and receiving no response. The Court considered whether the lack of announcement of identity and purpose was excused where such announcement might have endangered the officers, citing without disapproval *Gilbert* v. *United States*, (9th Cir. 1966) 366 F.2d 923, 931 which expressly recognized the validity of this exception. The Court found that the *Sabbath* record revealed no basis for excusing the lack of compliance, since the officers had no basis for assuming the intended arrestee was armed. Here, in strong contrast, the officer himself saw the knife at appellant's hand and had good reason to think he might use it. Appellee submits this constitutes that basis for excusing failure to announce authority and purpose which *Sabbath* recognized as sufficient.

No case in the Supreme Court or this jurisdiction has ever held there was not such an exception to the requirement of Section 3109. None of the cases dealing with the possible exceptions have presented as strong a case exemplifying the exception based on peril to the officers from an

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harm. . . . Whether the unqualified requirements of the rule admit of an exception justifying non-compliance in exigent circumstances is not a question we are called upon to decide in this case. The Government makes no claim here of the existence of circumstances excusing compliance." In *Wong Sun*, 371 U.S. 471 (1963), the Supreme Court referred to the possible exceptions stated in *Miller* but found they did not exist in *Wong Sun*, noting the Government there, as in *Miller*, claimed no extraordinary circumstances which excused the officer's failure to state his mission before he broke in. *Ker* v. *California*, 374 U.S. 23 (1963) reviewed the common law rules as codified in California Penal Code, Sec. 844, substantially similar to 18 U.S.C. 3109, noting that announcement was not required under a judicially fashioned exception to California's statute stemming from common law if the officers' peril would have been increased by prior announcement. In *Sabbath* v. *United States*, *supra*, the Supreme Court stated at footnote 8: "Exceptions to any possible constitutional rule relating to announcement and entry have been recognized, see *Ker* v. *California* at 47 (opinion of Brennan J.), and there is little reason why those limited exceptions might not also apply to Section 3109, since they existed at common law, of which the statute is a codification."

armed and dangerous intended arrestee as that here. See *Accarino* v. *United States*, 85 U.S. App. D.C. 394, 179 F.2d 456 (1949); *Keiningham* v. *United States*, 109 U.S. App. D.C. 272, 276, 287 F.2d 126, 130 (1961); *Hair* v. *United States*, 110 U.S. App. D.C. 153, 289 F.2d 894 (1961); *Wayne* v. *United States*, 115 U.S. App. D.C. 234, 318 F.2d 205 (1963); *Reid* v. *United States*, 210 A.2d 867 (D.C.A. 1964); *Smith* v. *United States*, (5th Cir. 1966) 357 F.2d 486; *United States* v. *Hassell*, (6th Cir. 1964) 336 F.2d 684, *cert. denied*, 380 U.S. 965 (1965).[11]

For these reasons appellant's arrest was valid and the physical evidence properly admitted.

III. Appellant was presented to a committing magistrate without unnecessary delay.

(Tr. B10, 15, 17, 21, 27, 28, 31, 21; Tr. C72, 77, 79, 81; Tr. 171)

Appellant was arrested at about 2:40 a.m. (Tr. B10). He was presented to a committing magistrate at 10:00 a.m. after Court opened on the same morning (Tr. 171). Shortly after arrest he was identified by the complaining witness at the hospital. Samples of his head and pubic hair and his clothing were obtained between arrest and presentment. Appellant contends that there was unnecessary delay in presenting him and that his clothing and evidence of the identification should have been suppressed for that reason. His contention is not well founded.[12]

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[11] In *Berigan* v. *State*, 236 A.2d 743 (1968), the Maryland Court of Special Appeals gives a recent summary of District of Columbia law regarding exigent circumstance exceptions to Section 3109.

[12] Appellant also claims broadly that his Constitutional rights were violated because of the lack of counsel at the hospital confrontation (Appellant's Brief, pp. 16-17). This claim also is unfounded. The confrontation occurred three months before the Supreme Court's June 12, 1967 decision establishing the Sixth Amendment right of a suspect to counsel at a pre-trial confrontation with witnesses. *United States* v. *Wade*, 388 U.S. 218 (1967). This right is prospective only, governing identification confrontations conducted after June 12, 1967. *Stovall* v. *Denno*, 388 U.S. 293 (1967). Accord-

After the arrest at about 2:40 a.m. the officers drove appellant a few blocks to the hospital, arriving there within four or five minutes sometime between 2:40 and 2:55 a.m. (Tr. B17, C72). Detective McCaffrey testified they returned to the hospital for two reasons, to determine whether the complaining witness could identify appellant and to return her son (Tr. B15, C72). Shortly thereafter the complaining witness identified appellant. The officers immediately advised him of his Constitutional rights (Tr. C77, C79, B21). Then they drove him to the precinct and booked him, arriving there within about five minutes (Tr. C81) at about 2:50 a.m. (Tr. 171). At 5:05 a.m. Detective DeMilt saw appellant in the Detective's office, identified himself, apprised him of the charge, and apprised him again of his rights (Tr. B27). Appellant denied knowing the complaining witness or ever having been in her house (Tr. B28). DeMilt took his clothing and samples of his head and pubic hair.[13] Appellant

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ingly, this case presents no need to consider whether *Wade* establishes a Sixth Amendment right to counsel even at a time and place proximate to the offense and chase. See *Wise, supra.*

[13] The instant case exemplifies the situation where skillful, hard pressed investigation can produce additional evidence, as reflected in Justice Frankfurter's statement in *Watts* v. *Indiana,* 338 U.S. 49, 54 (1949) (murder conviction reversed as violative of due process since based on forced confession) that:

> Ours is the accusatorial system as opposed to the inquisitorial system. . . [S]ociety carries the burden of proving its charge against the accused not out of his own month . . . but by evidence independently secured through skillful investigation.

The contrasting situation where skillful, hard pressed investigation cannot develop further evidence except by talking to suspects is reflected in Justice Frankfurter's statement in *Culombe* v. *Connecticut,* 367 U.S. 568, 571 (1961) (murder conviction reversed as violative of due process since based on forced confession) that:

> Despite modern advances in the technology of crime detection, offenses frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offenses, nothing remains—if police investigation is not to be balked before it has fairly begun—but to seek out possibly guilty witnesses and ask them questions. . . such questioning is often indispensable to crime detection.

Cf. Miranda v. *Arizona,* 384 U.S. 436 (1966).

was taken to Court for presentment to a judge at 10:00 a.m. (Tr. 171). DeMilt testified that appellant was not taken before a magistrate earlier because there was none available until Court opened at 10:00 a.m. (Tr. B31-32).

Even had Court been in session at the time of arrest, it is clear under *Wise* v. *United States*, *supra*, that the time spent in speedily confronting the complaining witness and appellant did not constitute unnecessary delay. Rule 5(a) does not prohibit delay for a reasonable time after arrest in order to provide identification of the suspect. To avoid fruitless controversy, *Wise* v. *United States*, *supra* declared forthrightly that procedure for prompt identification of a suspect apprehended immediately after the offense is sound as a general procedure and presents no problems for exploration under Rule 5(a). Here the time spent in accomplishing identification was approximately fifteen minutes—well within the *Wise* language and *rationale*. Appellant's attempt to explore nonexistent problems should be rejected.

Appellant's bare assertion that the police should have taken him to a committing magistrate at about 2:40 a.m. is unsupported by any showing how this could be done before a Court which was not in session or magistrates who were not present. It is undisputed that Court was not in session until 10:00 a.m. Research has revealed no case in this jurisdiction holding that a conviction would be reversed for failure to summon committing magistrates from their beds for an early morning presentment prior to the opening of the next regularly scheduled court or commissioner's sitting.[14]

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[14] Much dictum pointing in both directions can be found. See *Akowsky* v. *United States*, 81 U.S. App. D.C. 353, 158 F.2d 649 (1946) ("both by law and practice . . . application for hearing might have been made to . . . committing magistrates at any hour"); *Porter* v. *United States*, 103 U.S. App. D.C. 385, 258 F.2d 685 (1958), *cert. denied*, 360 U.S. 906 (1959) ("Surely a man arrested at eleven o'clock for assault need not be taken before a magistrate until the next morning", Reed, J.); *Lockley* v. *United States*, 106 U.S. App. D.C. 163, 270 F.2d 915 (1959) (". . . there is no require-

The basic purpose of Rule 5(a) is "to avoid all the evil implications of secret interrogations of persons accused of crime". *Mallory* v. *United States*, 354 U.S. 449, 453 (1957). The record shows that that purpose was not disserved by police action here. There is a total lack of basis for surmise that the delay was contrived to allow opportunity for secret interrogation. The police cannot be faulted for working within a Court schedule which they do not control. The period of detention was legal. The clothing obtained during that period was validly obtained and properly introduced into evidence.[15]

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ment that a committing magistrate be available at all hours"); *Jones* v. *United States*, 113 U.S. App. D.C. 256, 307 F.2d 397 (1962) ("[N]ot only a magistrate, but an Assistant United States Attorney, are . . . available to the police twenty-four hours a day."); *Coleman* v. *United States*, 114 U.S. App. D.C. 185, 313 F.2d 576 (1962) ("[i]f because of some extraordinary circumstances no magistrate were available, it would not follow that questioning could continued"); *Turberville* v. *United States*, 112 U.S. App. D.C. 400, 303 F.2d 411 (1962) *cert. denied*, 370 U.S. 946 (1962) ("We think that unnecessary delay within the meaning of Rule 5(a) and the Mallory case has not occurred when a defendant is arrested, brought to police headquarters around midnight, begins to make a statement within thirty minutes thereafter, and is then taken before a magistrate at 10 a.m. the same morning."); *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963) ("We must reject any suggestion that a suspect arrested at noon on Saturday may be questioned in secret by the police for 46 hours without a preliminary hearing"). See *United States* v. *Mihalopoulos*, (D.C.D.C. 1964) 228 F.Supp. 994.

[15] Since there was no unnecessary delay in presentment, this case does not present the necessity for dealing with the relationship of the *Mallory* exclusionary rule to non-testimonial evidence like evidence of the hospital identification. *Cf. Adams* v. *United States*, —— U.S. App. D.C. ——, 399 F.2d 574 (No. 20,547, decided June 21, 1968); *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1958); *United States* v. *Klapholz*, (2d Cir. 1956) 230 F.2d 494, *cert. denied*, 351 U.S. 924 (1956); and *Wise*, *supra*.

IV. The hospital identification of appellant by Mrs. Allen comported with due process.

(Tr. B17-18, C74)

Appellant contends that the hospital confrontation of appellant and complaining witness proximate to the time and place of arrest deprived him of due process and that the judge erred in not suppressing all testimony thereof. His contention is not well founded.

Stovall v. *Denno*, 388 U.S. 293 (1967) held that although presentation of only one suspect in custody to a witness does raise problems of suggestivity, such a viewing is not *ipso facto* violative of due process. Rather, the defendant may be afforded an opportunity to show that the particular confrontation "was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process." 388 U.S. at 301-302. In deciding this question, the totality of the circumstances should be examined.

The circumstances of the confrontation here fall within the language and *rationale* of *Wise* v. *United States*, *supra*. Here was a confrontation proximate to the scene and time of the offense as well as the apprehension, where the observers and actors were limited to those that were in fact present at the scene and time of the offense and of the single, continuous pursuit action taken to identify, locate, and apprehend the suspect. Here were circumstances of fresh identification, elements that if anything promote fairness, by assuring reliability, and are not inherently a denial of fairness. *Wise*, *supra*. See *Wright* v. *United States*, D.C. Cir. No. 20,153, January 31, 1968 (dissenting opinion). Had Mrs. Allen been unable to identify appellant as her assailant, the police would have had to renew the search for the real assailant. Obtaining speedy confirmation or denial that the victim can identify the suspect aids in effective deployment of limited police resources. *Simmons* v. *United States*, 390 U.S. 377 (1968), recognized the value of this factor. Parallel to

this legitimate police interest[16] is that of innocent suspects in demonstrating innocence early on through speedy confrontation, recognized by this Court in *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723 (1961), *cert. denied*, 368 U.S. 883 (1961).

The possibility that Mrs. Allen's hospital identification was mistaken is shown by surrounding circumstances to be very slim. This is not a case where the assailant wore a mask and identification was based only on hearing the voice, the victim being prevented by police from seeing the suspect.[17] Here Mrs. Allen had about one hour to observe her assailant, saw his face, heard him speak, and testified that she had seen him in her house previously as a friend of her son. She gave a description to police about two hours after the assailant left, presumably fixing her crystallized recollection in mind. She repeated her description to her son upon his arival at the hospital.[18] Her identification at hospital curbside and at trial was positive and unwavering. The value of such firmness is recognized in *Simmons*, *supra*, and *Crume* v. *Beto* (5th Cir. 1967) 383 F.2d 36. FBI laboratory comparison tests showed that fibers found on appellant's clothing were identical to those of which Mrs. Allen's clothing were made. Detective McCaffrey who brought Mrs. Allen to the car

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[16] In balancing the Fourth Amendment protected right to privacy against the Government's interest in solving crime, the Supreme Court said in *Warden* v. *Hayden*, 387 U.S. 294, 306 (1967): "The premise in *Gouled* [*Gouled* v. *United States*, 255 U.S. 298 (1921)] that Government may not seize evidence simply for the purpose of proving crime has likewise been discredited. The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that Government has an interest in solving crime."

[17] See *Palmer* v. *Peyton* (4th Cir. 1966), 359 F.2d 199.

[18] Detective DeMilt testified she described the assailant to him before the confrontation *inter alia* as about six feet and 170 pounds. Appellant is five foot seven and 140 pounds. However, this discrepancy did not prevent the total verbal description she gave Gregory from being sufficiently accurate to alert him speedily to the possibility that it was appellant.

to view appellant told her only that he wanted her to look at someone the police had arrested who was in the car (Tr. B17-18, C74). He did not tell her he had recovered a knife from appellant at arrest or that he thought appellant might be the assailant (Tr. B18, C74). Nor was appellant handcuffed. The record shows no identification by Mrs. Allen of any other person as assailant and no failure by her to identify appellant on a prior occasion. The lapse of time between offense and confrontation was so short as to allow full advantage to be taken of memory still vivid. See *United States* v. *Wade*, 388 U.S. 218, 241 (1967). These factors combine to exclude effectively the possibility that police suggestion resulted in a mistaken identification.

Assuming *arguendo* there was substantial suggestivity in this confrontation, appellee's position is that that suggestivity did not render the identification violative of due process since there has been no showing despite ample opportunity that the procedures followed were not the fairest feasible under the circumstances. *Wright* v. *United States*, D.C. Cir. No. 20,153, decided January 31, 1968 (dissenting opinion). Appellant's bare assertion that there was no reason why appellant could not have been placed in a line-up and then viewed by Mrs. Allen simply does not constitute such a showing, nor does his suggestion that Mrs. Allen—three and one half hours after an hour long, blood spattered, knife point rape—should have gone to the precinct to view the suspect, since she had been physically able to walk from the hospital to the car parked at the curb. The record rather shows that the procedures followed by the police in using available materials in straightforward fashion without extensive pre-planning were the fairest feasible in the situation.

The hospital identification comported with both due process and effective law enforcement. Testimony thereof was properly admitted.

V. The trial judge did not err in declining to grant appellant's motion for a pre-trial in-court line-up.

(Tr. C18-19, 24-25, 130-133)

Immediately prior to trial appellant moved for a hearing on his motion to suppress testimony of Mrs. Allen's hospital identification of appellant and for a pre-trial, in-court line-up to determine whether Mrs. Allen could identify appellant as a pre-requisite to an in-court identification at trial (Tr. C18-19, C24-25). After a hearing on the circumstances of the arrest and the hospital identification, appellant renewed his request for such a line-up, which the judge denied (Tr. C130-133). Appellant contends denial was error. His contention is unfounded.

In his apparent assumption that in-court identifications at trial are inadmissible unless based on pre-trial line-ups, appellant misreads the *rationale* of the cases of *United States* v. *Wade*, 388 U.S. 218 (1967), *Gilbert* v. *California*, 388 U.S. 263 (1967), and *Stovall* v. *Denno*, 388 U.S. 293 (1967). In-court identifications at trial are normally admissible unless based on an invalid confrontation; their admissiblity does not depend upon a valid pre-trial line-up. *United States* v. *Wade*, 388 U.S. 218, 253 (1967) (opinion of White, J., dissenting). The premises for the *Wade* ban on admission of in-court trial identifications stemming from invalid confrontations were fear of improper police suggestion contributing to erroneous identifications and the effect of the confrontation to crystallize the witness' identification for future reference. *United States* v. *Wade*, 388 U.S. 218, 240, 251. Erroneous crystallizations will not be rectified by later line-ups, no matter how fully they meet *Stovall* standards. Where a pre-trial out of court identification is challenged, the question is whether an in-court identification at trial resulted from an original crystallization which was prompted by confrontation procedures violative of due process, not whether later efforts were made to rectify such a flawed crystallization. Any showing of takeable but untaken measures to reduce the suggestivity level must

thus pertain to the original confrontation as it was held under the circumstances of the moment if it is to show that the fairest feasible procedures were not followed. Anything else is beside the point at which the *Wade-Gilbert-Stovall rationale* focusses.

Appellant cites no authorities for his contention. Being wholly unfounded in law, it should be rejected.

VI. The trial court did not err in declining to direct a verdict of acquittal on the first count charging rape for lack of corroboration of penetration.

(Tr. 28, 29, 33-34, 49, 114, 146-147)

Appellant contends that to sustain a rape conviction there must be not only general corroboration of the complaining witness' testimony but specific corroboration as well, assertedly absent here, that penetration was effected. His contention is without foundation both as to the need for specific corroboration and as to its absence here.

The need for corroboration depends upon the danger of falsification. *Thomas* v. *United States*, —— U.S. App. D.C. ——, 387 F.2d 191 (1967). Here consent was not an issue. There was no evidence undermining the trustworthiness of the complaining witness, as for example, that she was emotionally unstable, had any incentive to implicate the appellant falsely, or had been pressured in any way to report that penetration by force had taken place when in fact it had not. Her testimony that she screamed during the extended attack was corroborated by that of roomer Otis McRae that he heard screaming (Tr. 28, 33-34). Her testimony that appellant cut her face when she screamed was amply corroborated. After the assailant left she reported immediately to the roomer that she had been raped (Tr. 29, 49, 114). She told the first police officer she met that she had been raped (Tr. 146-147). Blood and signs of disturbance were found at the scene she described. Many other aspects of her testimony were corroborated by independent evidence.

Admittedly, there was no eye witness testimony other than her own to show that penetration had taken place,

but this is not required. The law requires corroboration of the complaining witness' testimony as to *corpus delicti* (penetration by force) in the sense that "there must be circumstances in proof which tend to support the prosecutrix' story." *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 17, 135 F.2d 633, 636 (1942), *cert. denied*, 318 U.S. 776 (1943); *Kidwell* v. *United States*, 38 App. D.C. 566 (1912); *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955); *Thomas* v. *United States*, *supra*; *Calhoun* v. *United States*, D.C. Cir. No. 21,119 (August 9, 1968). It does not require specific eye witness testimony to the fact of penetration or other specific corroboration of penetration. Appellant has cited no cases having that effect. In *Franklin* v. *United States*, 117 U.S. App. D.C. 331, 330 F.2d 205 (1964) the court merely repeated the then most recent teaching of *Walker* v. *United States*, *supra*, that corroboration is required as to *corpus delicti* (penetration by force). The *Walker* court affirmed a forcible rape conviction where specific eye witness testimony additional to that of the complaining witness and medical examination results were both lacking. *Walker* found adequate corroboration of penetration by force in the general corroboration of many other aspects of her testimony,[19] thus exemplifying the *Ewing* statement that only circumstances in proof tending to support the prosecutrix' story are required to sustain conviction.

Were specific corroboration of penetration required, however, it was amply available in: medical testimony showing that (1) a slide made from a vaginal smear taken from Mrs. Allen within twenty-four hours after the attack contained spermatozoa, and (2) this indicated

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[19] The *Walker* Court found corroboration of penetration by force in: mud stains and twigs found on the complaining witness' coat after the incident; her report to authorities made as soon as possible; the fact that she had a timely medical examination (the results of which were not available at trial); the finding of her hat next day at the scene she had described; signs of disturbance at the scene, the fact that her testimony was unshaken by cross-examination, and the absence of indication of improper motive for the charge. *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955).

there had been penetration within the preceding twenty-four hour period (Tr. 312-313, 350-352).

Furthermore, the sentence here was to nine years imprisonment for the two offenses of which appellant was convicted without designation of any part of the nine years as being for either offense. This is in effect a concurrent sentence. Appellant is thus to suffer no punishment for raping Mrs. Allen additional to that imposed for assaulting her with a deadly weapon. Any conceivable error is harmless, *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

Appellant's baseless contention should be rejected.

VII. The slides concerning which Dr. Perry testified were properly admitted under the Federal Shop Book Rule.

(Tr. 312-314, 318-321, 327-328, 334, 349-350, 362)

Dr. Perry, a D.C. General Hospital pathologist, testified that she examined slides bearing vaginal smears and Mrs. Allen's name (Tr. 350), that she had secured the slides from the hospital laboratory where they had been kept as part of laboratory records (Tr. 327-328-2/14, 334-2/14), and that one of the slides showed the presence of spermatozoa (Tr. 350). A hospital report dated March 10, 1967 recording the results of an examination of the slides for spermatozoa, made shortly after the smears were taken, was also admitted into evidence (Tr. 349-350, 362).

Appellant contends that Dr. Perry's testimony as to her examination of the slides should have been stricken for failure to establish proper continuity of possession of the slides. His contention is not well founded.

The slides[20] were properly admitted under the Federal Shop Book Rule, 28 U.S.C. Section 1732. *Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 211 F.2d 19 (1954), *cert. denied*, 347 U.S. 1019 (1954). Testimony showed

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[20] Two slides were marked as Government's Exhibit No. 15 (Tr. 350). Examination showed one contained spermatozoa and one did not. Testimony referring to "the slide" referred to the one on which spermatozoa was found.

that: the slides were records and results of the taking of vaginal smears from Mrs. Allen shortly after the rape; they were made and kept in the regular course of business; and it was the hospital's course of business to make them.

The slides were identified (Tr. 314-2/14) and the manner in which they had been prepared was explained. Dr. Edward Hurwitz of the hospital staff testified that he took two vaginal smears from Mrs. Allen and placed them on slides bearing her name (Tr. 312-313-2/14, 318-2/14). He testified that the slides were entered into the laboratory system by giving them to a nurse who was responsible for handling such matters (Tr. 318-321-2/14). Dr. Perry testified that under the standard hospital proceduce when such a smear is taken the patient's name is engraved with a diamond pencil on the slides: the slides are then sent to the laboratory with a request for examination (Tr. 328-2/14). Dr. Perry testified that she had secured the slides shortly before testifying from the laboratory where they had been kept as part of laboratory records (Tr. 327-328-2/14).

All the requirements of the Federal Shop Book Rule having been met, the slides were properly admitted. Any failure to show continuity of possession is immaterial. Dr. Perry's testimony as to the results of her examination of the slides taken from laboratory records was properly admitted.

VIII. The trial judge did not err in declining to instruct the jury on assault with intent to rape.

(Tr. 313-314, 318-324, 350-353, 376-379, 381)

Dr. Edward Hurwitz testified that he took two vaginal smears from Mrs. Allen on two Q-tips on March 10, 1967, made two slides therewith, and sent the slides to the laboratory for examination for presence of spermatozoa (Tr. 313-314-2/14, 318-321-2/14). He testified that his own examination of one of the smears showed no presence of sperm on that one (Tr. 321-323-2/14). Dr. Sophie Perry,

a qualified pathologist, testified that she got the two slides from laboratory records shortly before trial and that her examination showed the presence of spermatozoa on one of them (Tr. 350). Dr. Perry testified that the medical assumption thus was that there had been penetration by the male organ within the preceding twenty four hours (Tr. 350), although it being conceivable that spermatozoa can arrive in the vagina through means other than penetration (Tr. 351-353), she could not testify that penetration had been made based only on examination of the positive slide (Tr. 352-353).

Appellant contends that the testimony of Drs. Hurwitz and Perry could have been considered as evidence of assault with intent to rape. His contention is not well founded.

A defendant is entitled to instruction on a lesser included offense where there is affirmative evidence in the record to support a finding of guilt on that offense. *Belton* v. *United States*, 127 U.S. App. D.C. 201, 382 F.2d 150 (1967). And admittedly there may be some evidence of a lesser offense calling for a jury instruction in some cases even though this depends on an inference of a state of facts achieved by believing defendant as to part of his testimony and prosecution witnesses on other points in dispute. *Broughman* v. *United States*, 124 U.S. App. D.C. 54, 361 F.2d 71 (1966).[21] But a lesser-included-offense charge need be given only where there is evidence to support it, as the Supreme Court held in *Sansone* v. *United States*, 380 U.S. 343 (1965). Here there was an utter lack of testimony tending to show that appellant, having assaulted Mrs. Allen with intent to rape her, either failed or declined to achieve penetration during the hour and a

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[21] In *Broughman*, in *Hunt* v. *United States*, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963) and in *Young* v. *United States*, 114 U.S. App. D.C. 42, 309 F.2d 662 (1962) evidence was found that would support a conviction on a lesser offense. Each was reversed and remanded for new trial with a charge on the lesser offense. In each case, unlike the instant case, the defense introduced affirmative testimony providing support for the theory of the lesser offense instruction.

half while he held her at knife point. Such failure to achieve penetration could be made out only if the jury supplied facts not supported by the evidence. See *Brooke* v. *United States*, 128 U.S. App. D.C. 19, 385 F.2d 279 (1967).

The trial judge denied the requested instruction only after pointed review whether there was evidence to support it or not (Tr. 376-379). Thereafter the defense rested without introducing any affirmative testimony of its own (Tr. 381).

That positive evidence of spermatozoa in the vagina within twenty four hours provides only a high degree of probability that it got there by penetration rather than absolute certainty simply does not constitute affirmative evidence that appellant assaulted with attempt to rape but failed or declined to achieve penetration. Appellant's contention that it does should be rejected.

IX. The trial court did not err in giving the "Allen" charge.

(Tr. 462)

After the jury had been out several days its foreman reported it deadlocked on the rape count and requested further instructions (Tr. 462). The Court gave the so-called "Allen" charge. Appellant contends this was error for the reasons noted in the dissenting opinion in *Jenkins* v. *United States*, 117 U.S. App. D.C. 346, 330 F.2d 220 (1964), these being generally that the charge is coercive. Appellant's contention is not well founded.

This Court upheld the "Allen" charge again in *Fulwood* v. *United States*, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), *cert. denied*, 387 U.S. 934 (1967). The Supreme Court approved it again by implication in *Kawakita* v. *United States*, 190 F.2d 506 (1951), 343 U.S. 717 (1952). All Courts of Appeals faced with the issue have affirmed the charge. See authorities cited in *Fulwood* v. *United States*, *supra*, n.3.

Appellant's contention should be rejected.

X. The trial judge did not err in admitting either the complaining witness' testimony of her statement to Gregory or Officer Pratt's testimony of her statement to him.

(Tr. 47-48, 110-111, 117, 143-147)

Mrs. Allen arrived at the hospital and met Officer Robert Pratt between one hour and forty-five minutes and two hours and twenty-five minutes after her attacker had completed his assault (Tr. 47-48, 110-111, 117, 143). Testimony by Pratt was admitted over objection that she told him she had been cut and raped by a friend of Gregory whom she had seen before (Tr. 143-147). Gregory joined her at the hospital between two hours and twenty-five minutes and three hours and fifteen minutes after the attacker had left her (Tr. 47-48, 110-111, 117, 143). Testimony by her was admitted as to what she had told Gregory, namely, that she had been cut and raped by a friend of his who had asked for the return of some cleated shoes. Appellant contends that both of these statements were hearsay which it was error to admit. His contentions are not well founded.

Mrs. Allen's testimony as to what she told Gregory was not hearsay. Wigmore states the hearsay rule as:

> That rule which prohibits the use of a person's assertion, as equivalent of the fact asserted, unless the assertor is brought to court on the stand, where he may be probed and cross-examined as to the grounds of his assertion and of his qualifications to make it.

5 Wigmore, Evidence Section 1364 (3d ed. 1940)

Since Mrs. Allen was brought to the stand for cross-examination, her testimony as to what she told Gregory was not objectionable as hearsay.

Officer Pratt's testimony as to what Mrs. Allen told him was admissible under the *res gestae* exception as a spontaneous utterance. The hour long rape and cutting of her face had undoubtedly placed her under stress of nervous excitement; the statement was made to the first

police officer she met and before she had time to fabricate; her statements as admitted related directly to the circumstances of the event which produced the stress. See 6 Wigmore, Evidence Section 1745 *et seq.* (3d ed. 1940) and *Beausoliel* v. *United States*, 71 U.S. App. D.C. 111, 113-114, 107 F.2d 292, 294-295 (1939). There is no requirement that the declaration be immediate. The time element is important but not controlling. Generally, the trial judge's exercise of judicial discretion in determining whether the statement of a victim of violence should be admitted as a spontaneous utterance should not be disturbed on appeal except for a most compelling reason. *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 207 F.2d 19 (1953). Here the trial judge ruled the statement admissible only after pointed inquiry into the circumstances surrounding its making (Tr. 143-145). And appellant has cited no compelling reason why this exercise of judicial discretion should be overturned.

Mrs. Allen's statement to Gregory is also admissible as a verbal act contemporaneous with Gregory's going with the officers to locate appellant, relating to it, and throwing light on it.

Were it error to admit either or both of the challenged statements, it would be harmless. Mrs. Allen, the source of each statement, was available to counsel for cross examination on each of them.

Appellant's contentions should be rejected.

XI. The trial judge did not err in declining appellant's request for a missing witness instruction.

(Tr. 385-388)

Two months before trial the Government provided appellant with a capital list of names of witnesses to be produced at trial. Included was the name of Gregory Allen, the complaining witness' son, with the address of her house. Neither side called the son at trial. The trial judge denied a request by appellant for a jury instruction that if it found he was peculiarly available to a party

which failed to call him or account for his absence the jury could infer he would have testified against that party (Tr. 385-388). Appellant contends this was error. His contention is unfounded.

This Court has recently reaffirmed that the missing witness instruction is required only where (1) it is peculiarly within the party's own power to produce the witness, and (2) the witness' testimony would elucidate the transaction; this Court has outlawed both comment to the jury and instructions by the judge where either of these conditions is lacking. *Wynn* v. *United States*, —— U.S. App. D.C. ——, 397 F.2d 621, 625 (1967).

Gregory was not peculiarly available to the Government. Appellant made no effort to subpeona him (Tr. 386-387). Appellant depended rather on the Government to call Gregory so that he might cross-examine him (Tr. 386). Appellant's counsel learned from the complaining witness' testimony on February 13, 1968 that Gregory was in California. Yet he made no effort thereafter before the close of evidence on February 15, 1968 to subpeona him or to get the aid of the Court in securing his testimony (Tr. 388). A party who has made no effort to use the means available to him to secure the testimony of a witness cannot be heard to say he did not have these means. Appellant's contention in point of fact is not that Gregory was not available to him, but that he had a right to rely on the Government's calling him as its witness (Tr. 386). This failure to exercise a capability open to appellant to secure Gregory's testimony is simply not the peculiar availability of the witness to the non-calling party which is required as a basis for the instruction. *Wynn, supra.*

Nor would Gregory have been able to add significant new information, if called, and thus elucidate the transaction. He had not been at the scene of the crime. He could not identify appellant as assailant, or alibi for him. No adverse inference arises from a party's failure to call a witness whose testimony would be merely cumulative or redundant. *Richards* v. *United States*, 107 U.S. App. D.C.

197, 275 F.2d 655 (1960). See 6 Wigmore, Evidence Section 1907 (3d ed. 1940).

Both elements prerequisite to the giving of the instruction being absent here, it was not error for the judge not to give it. See also *Pennewell* v. *United States*, 122 U.S. App. D.C. 332, 353 F.2d 870, 871 (1965).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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